Protection of Human Rights by National and International Courts: A Comparison

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Introduction

The notion of human rights has become universally well-known in 1948, when the United Nations (created in October 1945) solemnly proclaimed the Universal Declaration of Human rights, eventually adopted by its General Assembly, in its meeting in Paris on 10 December 1948. The Declaration was drafted within the UN Commission of Human rights, presided by Ms Eleanor Roosevelt (the late President Franklin Roosevelt's widow); one of the most active drafters was the French René Cassin, who eventually was granted the Nobel Prize for Peace in 1968.

Of course, the very idea of human rights was not completely new. In some Western countries, the notion appeared beforehand. In England, the Magna Carta was granted by the King as early as in 1215; then the Habeas corpus law and the Bill or Rights were adopted in 1679 and 1689, respectively. In the United States of America, the Declaration of independence of 1776 (drafted mainly by Thomas Jefferson) insisted on the importance of the protection of human rights, which was confirmed after the 1787 Constitution by the first amendments to it in 1791, still in force; whilst in France the first piece of legislation – and the first symbolic political act - of the newborn French Revolution was the Declaration of the rights of man and the citizen, adopted by the Constituante (the Constituting Assembly) in August 1789.

But again, though important, those legal acts were far from being universal. And the emergence of the notion of human rights and freedoms or of fundamental rights at the more recent period finds its origins in the disaster of the Second World War, with its consequences in terms of millions of dead and injured persons, and of huge material destructions, without forgetting the high number of refugees and displaced populations.

Since that period, most national Constitutions in the world, and many international instruments, have defined and enumerated catalogs of human rights and freedoms, giving them a legal protection at either constitutional or international level. Moreover, the strong

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movement of decolonization and accession to independence, in the forties, fifties and sixties, has contributed to the multiplication of States in the world (to give you an indication, there were 58 States within the UN Organization in 1948, when the Universal Declaration was adopted: they are 193 right now). Accordingly, the number of Constitutions has also considerably grown up, and the constitutional protection of human rights in the world has equally increased. And the impressive rise and development of international public law has led to many new tools of protection in the field of human rights.

However, such protection is completely effective only if legal mechanisms, especially judicial ones, guarantee the rights and freedoms against infringement by various stakeholders, including the States themselves and their agents. This will be more completely explained later on.

My lecture will describe first the national tools of protection (Constitutions and courts), secondly the international tools (Treaties and courts or quasi- jurisdictions), and finally will compare the two categories and analyze their combination, if any.

I. The national tools of protection

A. The Constitutions

They are the most important legal texts in a country, at the top of the "hierarchy of norms" (see the inventor of that legal doctrine, the famous Hans Kelsen from Austria, 1881-1973, and its books, particularly the "General theory of norms", a book published after his death in 1979).

A wide majority of States does have a written Constitution (the oldest one is the American Constitution, 1787); a few States, such as United Kingdom and Israel, have not: their constitutional traditions and principles, in this case, are of a customary character. This does not mean a lack of importance.

In particular, the hierarchy of norms is a common feature in practically all countries.

As a matter of principle, the constitutional norms, either written or unwritten, are hierarchically superior to all the other legal norms, such as the Acts of Parliament or the administrative rules and regulations. Whenever two categories of legal norms are conflicting between them, the superior shall prevail.

Sometimes, there is coexistence of written provisions and of unwritten principles. By example, in my own country, France, the present Constitution dates back to 1958 (the "Fifth Republic"). The constitutional lawyers utilize often the notion of "block of constitutionality", composed of the articles of the current Constitution, of some other older written provisions, including the 1789 Declaration as well as the Preamble to the 1946 Constitution, and some unwritten fundamental principles. All of those rights have a constitutional value, and a high proportion of them deal with human rights. This means that human rights

are provided for and guaranteed at a constitutional level.

Most Constitutions, at least since the end of World War II, contain a list of fundamental rights, which belong to the people. That is the case, for instance, for Japan, where more than 30 articles of the 1946 Constitution deal with Human rights and their protection.

B. The national Courts

Every country has a specific judicial system.

Sometimes, the courts belong to a unique category, and they have jurisdiction for disputes between private individuals and for disputes between private persons and public powers as well (for instance, United States, UK, "common law" countries, Japan…).

In other cases, the judicial system is dual or dualistic, with "ordinary courts" on one hand and administrative courts on the other hand (for instance, France, Belgium, Italy, and many European States, the so-called "continental law" countries).

Sometimes, the structure of the judicial system is more complex. For instance, in Germany, they are five orders of jurisdictions. Another element of complexity affecting the judicial organization is connected with federalism. Many countries in the world are Federal States (opposed to unitary States). They do not constitute the majority but many very populated countries, such as India, the United States, Brazil, Mexico, the Russian Federation, Germany, are federal. This means that there are usually two sets of judicial bodies and of judicial hierarchy, at the level of the States composing the Federation (such as the Lander in Germany or the cantons in Switzerland) and at the level of the Federation itself.

In all hypotheses, usually, those tribunals have no competence or jurisdiction to review the conformity of the legislation with the Constitution: the result is, or was, the sovereignty of the legislation and of the Parliament.

On the other hand, mainly since the end of the First World War, and even more after 1945, there appeared Constitutional courts, established with the special aim, among other tasks, of reviewing whether the legislation adopted by Parliament is in conformity with the Constitution, or not. If not, the acts of Parliament are or become invalid: they are either quashed or simply put aside and anyhow not enforceable.

Many examples can be given of such Courts. The oldest one is the Supreme Court of the United States, created by the 1787 Constitution; its role in the sense of a constitutional review dates back to its famous judgment in the case of Marbury v. Madison in 1803.

Roughly, there are about one hundred Constitutional courts in the world. This is more than the majority of the current number of States members of the United Nations. The most populated countries have got a constitutional court: China, India, the USA, Indonesia, Brazil, Pakistan, Nigeria, Bangladesh, the Russian Federation, Japan…And most European countries, including Germany, France, Italy, or the UK as well.

This power of Constitutional courts puts an end to the sovereignty of the legislation

and the Parliament, and ensures the primacy of the constitutional provisions, including the fundamental rights, whenever they are included in said provisions. In other words, the legislator must respect the fundamental rights.

II. The international tools of protection

Before the Universal Declaration of human rights, no real protection of human rights did exist at international level. Even the Declaration itself provides just an indirect protection, insofar as it has no legally binding effect. Its scope is rather political and moral.

A. But, as a follow up, many **international treaties** have been drafted in the field of human rights, several of which have a binding effect.

Most of them are regional treaties: the European Convention on Human Rights (1950), the American Convention on Human rights (1959), the African Charter of Human and Peoples' rights (1986), the Arab Charter of Human rights (2004).

Some other treaties are worldwide, but they constitute "soft law" rather than binding instruments : for instance the UN Covenants on civil and political rights, and on economic, social and cultural rights (1966) both derived from the universal Declaration, or the UN Convention on the rights of the child (1990), and many others.

More precisely, such treaties may be binding at national level, depending on the law of each country; but they lack international courts able to protect and enforce them at international level. The dream of a World Court, shyly expressed by a few persons at the time of the drafting of the Universal Declaration, has never been made concrete. Actually, the International Court of Justice (ICJ) in The Hague is a worldwide Tribunal, and even is one the permanent organs of the United Nations. But its judicial activity is dedicated to conflicts between States, and not between people and States: furthermore, it is only indirectly and seldom that the ICJ touches upon human rights issues.

B. The international courts specialized in the protection of Human rights:

The oldest and most important is the European Court of human rights (ECHR), created by the European Convention (signed in 1950), which started its operations in 1959 and is located in Strasbourg, France. Other regional or subregional international courts are important, especially the Interamerican Court of Human rights, created by the American Convention: it started in 1979 and is located in San José, Costa Rica. One should also mention the African Court of human and peoples' rights, which sits in Arusha, Tanzania; and other mechanisms at a subregional level, including the Commission of human rights of ASEAN (ASEAN has ten member countries), and the future Arab court of human rights, under the aegis of the Arab League, which will sit in Bahrain. They are more embryos of international tribunals.

Moreover, the European Court of Justice (created in 1954 and located in Luxemburg), which functions within the European Union, ensures an important, complementary role of protection of human rights at the level of the European Union, notwithstanding the fact that it is not a truly specialized "human rights court".

Besides, some "quasi-courts" do exist, usually in the framework of the United Nations such as the important Committee of Human rights of the UN, or its Committee against torture, or the Committee of the rights of the child….

The difference is that whilst the Courts issue binding judgments that the States must abide by, the quasi-tribunals issue simply reports and recommendations (sometimes very influential, as instruments of "soft law", reflecting the interests of the international community, but not binding stricto sensu). The States can and should implement those decisions, but legally they are not bound to do so.

III. Comparison and combination of national and international protections

A. The usual process before national courts, ordinary or constitutional

There are various ways and means of protecting human rights and fundamental freedoms at a national judicial level.

Before the judiciary as such, usually the way consists of pursuing the liability of the persons responsible of a breach of one's human rights. This liability can be pursued even against the State or the State's agents, either by a direct action in torts, or by challenging the legality of any administrative regulation on the basis of which the State's action has been undertaken.

Before the Constitutional courts, the ways are various as well. In some countries, there is a concrete or direct way of action, based on the argument that the State has directedly violated the human rights by its doings or its omissions. This is for instance the case in Germany with the Federal Constitutional Court in Karlsruhe.

More often, the proceeding will consist in an abstract constitutional review, based upon the alleged lack of conformity with the Constitution of a piece of legislation able by its application to violate the applicant's rights. The most common procedure is, like in the USA, to utilize the so-called exception procedure. If the Supreme Court does rule that the challenged legislation is unconstitutional, it will not be applied to the applicant, but on the basis of the principle of stare decisis (the precedent), it won't be applied either to any other person (or company) in the same situation. In reality, the legislation will be left out.

B. The process before international courts

An important principle of international law is the principle of subsidiarity. Even if the international courts are willingly set up by the States – who thus accept the powers and role of the international machinery, this one remains subsidiary, i.e. the States' mechanism

remains entitled to offer the primary guarantee and judicial protection to the individuals; the review by international courts is ultimate.

This is translated in procedural terms into the obligation for the applicant of exhausting domestic remedies. If an individual (or a legal person) does not provide the domestic system and its judiciary with a chance to redress the alleged violation of his or her human rights, the individual's complaints before the international court shall be rejected as inadmissible. Only in exceptional cases, when it's clear that the domestic remedies don't exist or are not effective, they are admissible. Normally, the recourse to the domestic system must be done first.

The importance of the subsidiarity principle cannot be under estimated. In the case of the European Convention on human rights, as a follow up to the Brighton high-level conference in 2012, a new Protocol (n° 15) to the Convention – not yet in force-foresees that the subsidiarity principle (and the doctrine of the national margin of appreciation as well) will be introduced in the Preamble to the Convention, in order to oblige the Strasbourg court to practice a judicial restraint.

In terms of procedure, the most important and active international tribunal, in the field of human rights, is precisely the ECHR in Strasbourg. Its system of judicial protection lies on two pillars: the right of individual petition, which has become general and compulsory since 1998, and the obligatory character of the Court's judgments when they find a violation of the Convention by the defending State. The execution of the judgment, according to the Convention itself, is supervised by the Committee of Ministers of the Council of Europe.

Thus, admittedly subject to the respect of the exhaustion of domestic remedies (and to other procedural prerequisites), the protection by the ECHR of human rights, as they are guaranteed by the Convention, is rather simple. This explains the huge number of cases brought to Strasbourg (more than 50,000 each year! – but a wide proportion are inadmissible).

C. The effectiveness of the national protection

It very much depends on various possible situations and factors:

First of all, the existence of the rule of law in the specific country, and of a tradition or a culture of respect for the rule of law and of avoiding arbitrariness.

Another element is the existence there of effective remedies, and in particular of a judicial system independent, impartial, honest (the danger being corruption of the judges), efficient, which includes a reasonable delay in the adjudication of the cases.

René Cassin used to say that the rule of the right to a fair trial, as it is expressed in Article 6 of the European Convention on human rights, is crucial and central. No other right can be respected if the trail is unfair.

Finally, the possibility of a constitutional review of the legislation is also increasingly

extremely important; otherwise the legislation could be enforced against freedom.

Sometimes, such possibility simply does not exist, like in France before 1958, or is not open to the ordinary citizen, like in France before 2010. This is why an advisory body such as the Venice Commission (which operates within the Council of Europe but has extended its competence to extra-Europeans countries), insists on the necessity of the rule of law and on the creation of an effective constitutional judicial review.

Facing all those criteria, the records of the various States (by example of the 47 members of the Council of Europe, under the European Convention on Human rights) are quite different one from each other.

D. The effectiveness of the international protection

As a matter of principle, this way of protecting human rights, even if subsidiary, is even better, since its aim is to correct the misgivings and shortcomings of the national protection. This is well reflected in the wording of Article 19 of the European Convention: "To ensure the observance of the engagements of the high contracting parties to the Convention and the Protocols thereof, there shall be set up a European Court of human rights".

The overlook of the case-law of courts such as, by excellence, the Strasbourg, San Jose and Luxemburg Courts, shows that they have been very effective in protecting human rights and freedoms, even against the States, and very influential in shaping a continental or subregional legal order, in spite of several serious difficulties met in the past.

But some serious obstacles remain and hinder the effectiveness of the systems.

One should mention the lack of sufficient financial and human means compared with the big number and complexity of the cases. Also, the difficulty, at least in the case of Strasbourg and San José (the things are easier for the ECJ), to achieve a prompt and complete execution of judgments by the defending State, especially in sensitive trials, which take place more often than not. One may add the political skepticism, criticism and even open attacks from a few countries; criticism sometimes is expressed by domestic supreme and constitutional courts, hence the necessity of an international dialog between judges, an attitude that I qualified of "judicial diplomacy" when I was president of the ECHR.

A long-lasting obviously negative influence comes from the existence of situations amounting to potential or even real armed conflicts (look in Europe at the more or less frozen wars in some zones like in Cyprus, Transnistria, Chechnya, Nagorno Karabakh, Georgia, Ukraine…). They could revive, and in the meantime they don't facilitate the settlement of legal cases. The background is problematic.

A last element, which appeared some years ago, particularly with the World Trade center attempt in New York in 2001, and has spread over many parts of the world, is the terrorism phenomenon. Whilst the States are obliged to fight against these terrible viola-

tions of human rights, and to protect their populations from this plague, the danger still exists of sacrificing freedom for security's sake, and to endanger human rights.

E. The combination between national and international protection

All in all, and I must be optimistic, in the last 30 or 40 years or so, there has been a sort of virtuous circle; I mean by that a positive interaction between national courts, including the constitutional one, and international courts.

Fundamental rights have been more and more guaranteed and protected – at least legally -, either at national level, thanks to their inclusion in the Constitutions and the appearance of constitutional Courts, or at international level, through international conventions and treaties and international Courts. It happens that an international catalog of human rights is very similar to a constitutional catalog. Both ways of protection add to each other, not without conflicts sometimes.

Politically democracy has globally improved, at least in some regions of the World, such as Latin America and Central and Eastern Europe and some parts of Africa, in spite of worrying recent shortcomings and ways backwards. And the link between democracy, the rule of law and human rights is quite strong.

In the more traditional democracies, the legal influence of a tribunal like the Strasbourg court or the Luxembourg court has spread over many national systems, thus promoting useful reforms, not only procedural, but also substantive. Reciprocally, the most "advanced" domestic courts have also influenced by their examples the international case-law, enabling it to benefit all countries concerned.

Admittedly, a mutual positive influence has not to be taken for granted and implies sometimes mutual concessions; but all in all, I repeat, convergence efforts have produced, even to an extent improvable, a win-win relationship.

However, things are not always that simple and positive. In theory like in practice, combination of national and international laws may be conflictual. In theory many legal systems refuse the superiority of the treaties over the constitutions and constitutional principles. Despite the point of view of Kelsen, who claimed the founding principle of international Law, Pacta sunt servanda, implies the primacy of the treaties, many Constitutions say the contrary. For instance, the French.

Constitution admits the primacy of the treaties over the legislation, but asserts the primacy of the Constitution over the treaties.

In practice, this controversy may have negative effects, whenever a country does not accept to implement an international judgment if the condition of the implementation is a change in the Constitution. Fortunately, examples also exist of a willing acceptance of such international ruling. Paradoxically, in some cases, legislation considered at international level as in conformity with the treaty (by example the European Convention), can even be afterwards quashed by the national Constitutional court. This happens, admittedly more

seldom than the reverse.

As a conclusion

I should simply say that the universal dimension of human rights is a relatively recent phenomenon, that their protection becomes more and more sophisticated, and finally more effective. But I make an important reservation, namely that the world has become increasingly dangerous and human rights unfriendly. The struggle between the threats and the efforts of protection may be permanent. However it is the duty of human rights defenders and lawyers to go on fighting against the threats and in favor of all means of protection.

Thank you very much for your attention.

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